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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VANCE EUGENE SAMS, JR.,

Defendant and Appellant.

F074751

(Super. Ct. No. F14906439)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Charles M. Bonneau, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Brook A. Bennigson, for Plaintiff and Respondent.

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Defendant Vance Eugene Sams, Jr., stands convicted, following a jury trial, of second degree murder during the commission of which he personally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).)[1] He was sentenced to a total of 40 years to life in prison and ordered to pay restitution and various fees, fines, and assessments. On appeal, we hold: (1) The trial court did not err by (a) excluding evidence offered to bolster defendant's third party-culpability defense, (b) excluding evidence that assertedly could have affected the credibility of two prosecution witnesses, (c) admitting evidence of a hearsay statement by the victim, or (d) excluding evidence of the victim's prior convictions; but (2) defendant is entitled to a remand to have the trial court exercise its discretion whether to strike the firearm enhancement; and (3) the abstract of judgment and sentencing minutes must be corrected with respect to the amount of restitution.

FACTS

I

PROSECUTION EVIDENCE

Cardell Y. and his wife, Deloris, lived in the 3900 block of North Teilman, near Dakota and West.[2] They had two children, Sherry and Clifton. Clifton and his girlfriend, Tammy, lived at the house, while Sherry lived a block or two away, at the Hunter Place Apartments. Raymond Fisher was Sherry's ex-husband and the father of three of Sherry's children. As of July 4, 2014, defendant was Sherry's boyfriend.[3] He was very possessive of Sherry.

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1 After the jury deadlocked on a charge of first degree murder, the People withdrew the premeditation/first degree murder allegation.

2 For the sake of privacy, we refer to some persons by their first names or initials. No disrespect is intended.

3 References to undesignated dates in the statement of facts are to the year 2014.

As of July 4, Fisher had been out of prison for several months. Defendant and Sherry had been dating for about six to eight months at the time Fisher was released. Prior to Fisher's release, Sherry would visit her parents' house almost every other day. After Fisher was released, he frequently came to the house to visit his children and Clifton, with whom he was close. Sometimes Sherry would be at the house at these times. Her visits to the house became shorter and less frequent, however. Cardell was aware there was friction between defendant and Fisher. It centered around Fisher visiting with the children in close proximity to Sherry.[4]

Fisher was at Cardell's house when Cardell rose on the morning of July 4, having spent the night as he sometimes did. Fisher told Cardell he had gotten his first paycheck

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[4] According to Sherry, Fisher visited their children at the home of her parents or her adult daughter, N. These arrangements were made because he and Sherry did not get along. Although Sherry had full custody of the children, she wanted them to be involved in their father's life. Sherry had two addresses at the time. One was on Cavanaugh Way, a couple of blocks from her parents' house, and the other was with defendant. Defendant lived in the Hunter Place Apartments, in which complex N. (who was not Fisher's daughter) also resided. In July, Sherry was in the process of moving out of defendant's apartment, because he was seeing another woman. She did not tell defendant she was leaving. She did not feel safe or that it was safe for her children.

According to Sherry, Fisher and defendant did not get along. Defendant never denied Fisher the right to see the children. However, they did not "see eye to eye" on where visitation would occur, because Sherry would be the one to drop off the children and this would bring her into contact with Fisher. Sherry had made defendant aware that Fisher had been violent toward her on multiple occasions in the past. In addition, defendant was suspicious that Sherry and Fisher might be getting back together. Defendant accused Sherry of going to her parents' home to see Fisher and have a relationship with him. Defendant told Sherry to stay away from her parents' home. Defendant said he would beat Fisher if he caught the two of them having sex. When Sherry returned from her parents' home, defendant would check the gas and the mileage. He also told her that he could see her at her parents' house through the scope on his hunting rifle. Defendant got rid of the rifle prior to July 4. Sherry never saw him with a handgun. According to N., however, there was a small handgun in defendant's closet several weeks or a month before the shooting. The gun was small enough to fit in a man's pocket.

from his job and had made arrangements to take the children to his sister's house for a barbecue that day. Fisher used the house phone to call K., his daughter. K. answered the phone. There was a lot of commotion, yelling, and screaming, and Fisher was cut off.

According to Sherry, Fisher called her cell phone from her parents' house, as shown by the caller identification on her phone, at 9:05 a.m.[5] This upset her, because she had told him not to call her cell phone. She had told Fisher, "You already know how he [defendant] is." She was at defendant's apartment when Fisher called this time, and defendant was present. Sherry could tell he was angry about the call, and he looked upset. According to K., Sherry and defendant argued a bit. Sherry then passed the phone to K. Sherry was planning to go to the store, and left the apartment to wait for K. in the truck. Meanwhile, K. told Fisher that she was going to her boyfriend's house first, then would come to her grandparents' house as Fisher requested. She then gave defendant the phone.[6] K. saw defendant look at it. It would have indicated "grandma and grandpa."

According to Cardell, Fisher seemed frustrated and upset during the call, which lasted a minute or two. His voice went up in volume. After the call ended, he still seemed frustrated and angry. He said he could not understand why every time he tried to contact his children, it was such a big deal. Fisher said he had heard a lot of yelling and screaming before he was cut off.

Cardell got Fisher calmed down. They sat in the kitchen, talking, for 15 to 20 minutes, then Cardell went into another room to watch television with his wife. He told Fisher to let him know when he got the kids together, and Cardell would give them a ride

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5 Fisher called Sherry instead of calling K. directly, because K.'s phone was broken. Sherry and Fisher had an agreement that he could see his children on weekends and holidays.

6 According to N., who was also present, defendant snatched the phone from K. N. did not see what happened after, as she also went out to get in the vehicle. When K. came out, she was crying.

to the barbecue. Fisher said he was going to go out into the garage or sit on the porch to wait for his children, and Cardell returned to the bedroom.

Meanwhile, Clifton had gone to a store at Dakota and Fruit. On his way back to the house, he saw defendant walking up the street in the direction of the house. As she drove past her parents' house on her way to the store after dropping K. off at the home of K.'s boyfriend, Sherry saw Fisher sitting in a chair on the porch.

Cardell lay down in the bedroom for a few minutes, then heard a loud popping noise that sounded as if it was right in the living room. He and Deloris jumped out of bed and hurried to the front door of the living room. When they reached the door a few seconds later, they saw smoke in the upper area of the front porch, around the eve of the house, and smelled gunpowder.[7] Defendant was standing toward the rear of Cardell's SUV. When Cardell asked what the sound was, defendant said it was a firecracker. He seemed calm. He was wearing a black T-shirt and brown or black cargo shorts. Neither Cardell nor Deloris saw a gun in defendant's hand or anywhere on his body. Neither saw smoke coming from defendant. Clifton, however, believed defendant had a small gun in his right back pocket, because there was a bulge and the pocket was smoking. There was nobody else around.

Cardell and Deloris heard somebody screaming on the other side of the SUV. Deloris saw Fisher a little north of the house, hollering like he was in pain. She thought she saw smoke coming from the back of his shirt. He was running, then he collapsed across the street. When Cardell stepped off the porch, he saw Fisher lying face down at the intersection of Teilman and Pontiac. Cardell did not see anyone around other than

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[7] Sunglasses and a partially burned marijuana cigarette were found underneath one of the wicker chairs on the porch. Fisher's DNA was found on both items. Cardell did not smell marijuana smoke when he came outside. Clifton also saw smoke on the porch when he came outside after hearing someone running in the house. It smelled like fireworks.

Deloris and defendant. Cardell said, "Oh, my God, Vance, what did you do? What did you do?" Defendant did not answer.

Cardell ran across the street to Fisher, who was gasping for air. By the time he and Deloris rolled him over, defendant was standing over them. When Cardell rolled Fisher over, he saw a bloodstain on Fisher's T-shirt. Cardell thought Fisher had been stabbed, but when he raised the shirt, he saw a quarter-inch round entry wound in his chest and knew he had been shot. Cardell asked defendant what he did or what happened at least three times. Defendant never answered or offered to get help. He seemed calm. Then he walked away like nothing happened. He headed north on Teilman toward the apartment complex where he lived.

Tammy called 911 and brought the phone to Cardell.[8] The dispatcher gave him instructions on how to do CPR. The police arrived minutes later. Fisher died while Cardell was doing chest compressions, before police got there. At no time while they were outside did Cardell or Deloris see anybody running south on Teilman.

When police arrived, Cardell provided defendant's name to an officer. Cardell did this because defendant had been there, and Cardell was sure he did the shooting.

As Sherry was returning from the store, she saw paramedics or the fire department. N. yelled out, "Something's going on at grandma's house." Sherry thought something had happened to Deloris, who had had health challenges for some time. She drove as near to her parents' house as she could get, as police and emergency workers were already there. Fisher was still at the scene. When Cardell said defendant did it, N. screamed hysterically that she knew this would happen. Defendant had told N. of his suspicions that Fisher and Sherry were "messing around." On July 3, defendant texted N.

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[8] Fresno Police Officer Martens was dispatched to a report of a stabbing victim at the corner of Teilman and Pontiac at 9:21 a.m. or shortly after. He arrived within two to three minutes, and was the first officer on scene. Paramedics arrived a minute or two after that.

that "on his mom he's going to kill" Fisher. N. thought he was joking. She exchanged text messages with him and thought he had calmed down.[9]

Sherry left to get her other children, believing them to be at defendant's apartment. When she arrived, neither the children nor defendant was there. Sherry discovered the children were at N.'s apartment in the same complex. The police arrived a short time later. Between when she left defendant's apartment and went to N.'s apartment, Sherry did not see defendant in the apartment complex.[10] The police did not find defendant in the complex, either, although his vehicle was there. When his apartment was searched, however, a pair of wet black cargo shorts was found hanging on a shower rod in the bathroom. Both pockets had flaps. The one on the right side was unbuttoned. No weapons were found in the apartment.

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[9] When interviewed by Fresno Police Detective Rivera a few hours after the shooting, N. reported the threat. Rivera asked her to show him the message. N. went through her phone while Rivera watched, but she was unable to find the text. She seemed surprised that she could not find it. When Rivera asked to see her phone, she handed it to him. He reviewed the phone's contents, but could not locate any messages from defendant. N. said she was unsure if the text had been deleted, but she had sent a screen shot to K.'s phone. At trial, K. testified N. told her about the text message, but did not show it or send it to her. This occurred sometime before Fisher was killed. N. did show K. some text messages from defendant that showed defendant asking to be romantically involved with N. N. did not respond to them.

At some point, detectives told N. they were unable to find the messages she exchanged with defendant. N. explained that her messages got deleted after a certain number, in addition to which her children and siblings sometimes used her phone. There were previous occasions in which her children deleted messages or photographs from her phone to make room to upload games.

Phone records showed a series of text messages exchanged between N.'s and defendant's phones on July 3. The phone companies involved did not store the content of text messages, which would have been stored on the phones unless deleted. A forensic download of N.'s phone was unable to extract deleted content.

[10] Security cameras at the apartment complex showed someone wearing dark clothing, who might have been defendant, walking northbound on Teilman and into the complex shortly after 9:20 a.m. on July 4.

On July 4, police issued a "be on the lookout" notice for defendant. July 5, the public's assistance in locating defendant was requested by the police through various local media. On the afternoon of July 6, Rivera received a call from a person identifying himself as defendant and advising that he wanted to turn himself in. Rivera informed another detective concerning where this individual said he would be located. Defendant was found near the Fresno Police Department and was taken into custody without incident.

Fisher suffered a single, penetrating gunshot wound to the right side of the chest. The cause of death was perforation of the aorta, lung, and liver due to that gunshot wound. The bullet lodged underneath the skin on the left side back of chest. If Fisher was standing when shot, the bullet traveled front to back, slightly downward, and slightly right to left. One possible scenario was that Fisher was shot while sitting in a chair or starting to rise up from a chair. The bullet, which was recovered, was .38 caliber.[11] The entrance wound and absence of stippling indicated the muzzle of the gun was at least two and a half to three feet away when the shot was fired.[12]

At some point, Rivera reviewed the event report for this incident and noted that several hours after the initial 911 call, T.A. called dispatch to report that she observed a dark-complected individual during the time she heard a gunshot or fireworks. This was in the area of Teilman and Dakota. When contacted by Rivera on July 6, T.A. related that she and her dog were traveling south on Teilman when, at about the second street south of Dakota, she heard what she believed to be fireworks. She immediately turned,

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[11] No weapons or shell casings were found at the scene of the shooting, indicating the gun used was a revolver. According to Fresno Police Detective Castillo, who had been the range master assistant for the police department's training unit, most .38-caliber revolvers are small enough to fit into the palm of one's hand or a pocket.

[12] According to Dr. Gopal, who performed the autopsy, it would be very rare to see smoke coming from the shirt of a shooting victim, particularly from a distance shot as in this case.

whereupon she saw a dark-complected individual on the north curb line of Dakota, at Teilman. He was running east. When she saw media reports of the shooting, she was prompted to contact the police. When Rivera advised that the shooting occurred a few residences north of Quigley Park, T.A. concluded the individual she saw could not have been involved because of the distance and time it would have taken to run from the location of the shooting to the location at which she saw him.

II

DEFENSE EVIDENCE

As of July 4, T.A. resided at Dakota and Teilman. That morning, she was taking her dog for a walk. She had stopped at the corner of Teilman and Dakota when the dog, a service animal who usually liked to go for walks, signaled that she wanted to go back inside. That was when T.A. saw a man running south on Teilman on the sidewalk alongside Quigley Park. He was at about the intersection of North Teilman and West Lansing. Before she saw the man, T.A. heard a loud bang. She saw the man about 30 seconds later.[13] He was wearing jeans and a hooded sweater with the hood up, and running very fast. He was a dark-complected Hispanic or possibly an African-American, and had a medium to slender build. He appeared to be young, based on his gait, although not a juvenile. He had his hands down at his sides and did not ask for help or say to call 911. When he came to Dakota, he "darted out a little bit" into the street without looking for traffic, then turned and headed east on the sidewalk on the north side of Dakota.

T.A. lost sight of the man, then, because her service dog signaled that she was afraid for T.A. and/or herself, T.A. went back into her residence. At some point during the day, she saw a news story on television about the shooting. She then called the police and told them what she had seen. When she received a call from someone in law

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[13] It had already taken T.A. approximately 30 seconds to reach the corner. As was her habit, she took her dog for a walk right about 9:00 a.m.

enforcement in response, the "gist of it" was that they had the suspect and she did not have any information they needed. She believed the caller "shut [her] off" before she gave any details.[14]

Celia Alderete, a defense investigator, took a statement from Cardell on December 9. Cardell was cooperative and appeared to be honest. Cardell related that immediately after the shooting, defendant stood there and appeared to be in shock. When asked if he saw smoke coming from Fisher or defendant, Cardell said he did not.

Alderete conducted a timing test. Test results showed it took just over 26 to just over 27 seconds to run from the front of Cardell's residence to the corner of Teilman and Lansing, a distance of 468 or 468.2 feet.

Gary Cortner, a forensic consultant criminalist, explained that ammunition bought in stores uses smokeless powder. It does not cause smoke when fired.[15] He conducted test firings with a .38-caliber revolver and a .357 magnum. No smoke came out of the barrel in either instance. He opined that if either such weapon was fired and placed in a pocket, no smoke would be seen. Similarly, no smoke would have come from Fisher's chest.

DISCUSSION

I

EVIDENTIARY RULINGS

Defendant challenges a number of the trial court's rulings admitting or excluding evidence. We will address each in turn, but some general legal principles are applicable to all.

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[14] Rivera denied cutting T.A. off or saying her information would not be helpful.

[15] Fresno Police Officer Fleischmann was the rangemaster/armorer for the police department. As such, he was in charge of firearms training for all police officers and also firearm repairs. From his experience in the military and law enforcement, high quality ammunition produces very little smoke. Cheap, old, or reloaded ammunition may cause a lot of smoke, however.

"All relevant evidence is admissible. [Citation.] Relevant evidence is all evidence 'including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' [Citation.] In determining whether evidence has a tendency to prove a material fact, it must be determined whether it ' " 'logically, naturally, and by reasonable inference' " ' establishes the fact. [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174.) "A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law. [Citation.] 'The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule. [Citations.] Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. [Citations.]' [Citations.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 819-820.)

"Under . . . section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome [citation]." ' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 290.)

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, superseded

by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107, fn. 4 & overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) " '[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion.' [Citation.]" (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A. Third Party Culpability Evidence

Defendant contends the trial court erroneously excluded evidence offered to bolster his third party-culpability defense. We find no error.

1. Background

Defendant moved, in limine, to be allowed to introduce evidence of third party culpability in the form of T.A.'s testimony about the running man. Defendant further sought to admit evidence of Fisher's prior drug dealing and acts of violence. He asserted this evidence was relevant to Fisher's character trait of engaging in a dangerous life of being a drug dealer at the time of his death. Defendant asserted that on the day of Fisher's death, officers found in his wallet 1.0 grams of marijuana, 0.2 grams of methamphetamine, and 1.2 grams of cocaine base, as well as different denominations of cash, even though testing of his blood revealed the presence of only marijuana and methamphetamine and officers found no evidence of drug paraphernalia to indicate personal use of cocaine. Defendant argued this supported the conclusion Fisher was still engaged in selling cocaine and, coupled with T.A.'s testimony, made it more likely Fisher's death was drug-related and not the product of a jealous rage. Defendant sought to introduce two prior convictions Fisher suffered in 1991 for possession of cocaine base for sale and transportation or sale of a controlled substance, as well as two prior drug-related arrests.

The People did not object to the admission of T.A.'s testimony or her recorded telephone call to police. They did, however, oppose the admission of evidence such as

narcotic possession and sales and prior acts of violence, arguing the hypothesis the shooting could have been over a drug or gang dispute was "remote speculation." Accordingly, they moved to exclude Fisher's criminal record, history of incarceration, and arrests. They also moved to exclude the toxicology results, evidence of drugs recovered from Fisher's person, and Fisher's prior acts of violence. The People argued such evidence was irrelevant and/or should be excluded pursuant to Evidence Code section 352.[16]

The trial court found defendant's position "not persuasive," in that any time someone with a drug history was killed, a defendant could argue the killing was drug related. The court deemed the argument "tenuous," and noted there was no recent evidence of drug dealing or threats, or of any drug interaction between Fisher and any third party on the day of the shooting. The court concluded defendant was asking the court and jurors "to engage in rampant speculation."

2. Analysis

"It is a defense against criminal charges to show that a third person, not the defendant, committed the crime charged. [Citation.] A criminal defendant has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime." (*People v. Jackson* (2003) 110 Cal.App.4th 280, 286.) "We review the trial court's ruling on the admissibility of third party culpability evidence for abuse of discretion. [Citation.]" (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 790.)

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16 Further statutory references are to the Evidence Code unless otherwise stated.

The People also moved to exclude evidence of a fight that occurred in the area of the shooting at some earlier time, as well as allegations of gang connections to Cardell and Deloris's home. In his opening brief, defendant includes this evidence in his claim of error. In his reply brief, however, he concedes the defense eschewed any offer of proof as to these items of evidence, and says they should not be included in the argument on appeal.

"Third party culpability evidence is treated like all other evidence; if relevant it is admissible. [Citation.]" (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1174.) "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833; accord, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017.) Like all evidence, evidence of third party culpability is "subject to exclusion at the court's discretion under . . . section 352 if its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 140.) These limitations do not violate an accused's constitutional right to present a defense. (*People v. Hall, supra,* 41 Cal.3d at pp. 834-835; see *Rock v. Arkansas* (1987) 483 U.S. 44, 55.)

Applying these principles to the proffered evidence in the case at bench, we find no error. Defendant acknowledges the running man was not identified, and his motive, if any, was not specific to any one suspect; nevertheless, he says, the fact the man may have had a motive was "highly relevant." Defendant argues: "A drug transaction involving Raymond Fisher, whenever it occurred, created a debt. Failure to pay the debt would create a motive for murder." Defendant further asserts: "Taken together, [the excluded] evidence supported an inference that Fisher was back to his old ways, engaged in drug transactions including transactions close to the shooting. This in turn would support an inference that someone shot him in connection with a drug transaction, and that the shooter was the person seen running from the scene."

The trial court's ruling was correct. The proffered evidence was far too speculative to have probative value. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 372; *People v. Panah* (2005) 35 Cal.4th 395, 481-482; *People v. Lewis* (2001) 26 Cal.4th 334, 373.) It did not establish an actual motive, only a conceivable one. (See *People v. Pride* (1992) 3 Cal.4th 195, 238; *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1017-1018.) Its exclusion did not violate defendant's due process rights. (See *People v. Cornwell*, *supra*, 37 Cal.4th at p. 82; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)[17]

B. Rumors Concerning N.'s Relationships with Defendant and Fisher

Defendant contends the trial court erred by excluding rumors and allegations that N. may have had a sexual relationship with defendant and that Fisher may have expressed a sexual interest in N. Defendant says the evidence was relevant not for its truth, but for its effect on witnesses' testimonies and credibility, and its exclusion denied him his federal constitutional due process and confrontation rights.[18] We conclude the trial court did not err.

1. Background

The prosecution moved, in limine, to exclude rumors N. slept with defendant as being an improper basis for impeachment under section 787, and pursuant to section 352. The prosecution further sought exclusion, pursuant to section 352 and as hearsay, of rumors Fisher and N. wanted to "kick it."

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[17] Defendant complains that in closing argument, the prosecutor seized on the lack of motive evidence to cast doubt on the running man's involvement. Defendant did not object to the comments at trial, however (see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125), and in any event, the propriety of the trial court's ruling does not turn on the prosecutor's later argument.

[18] The Attorney General argues defendant forfeited his constitutional claims by failing to object on those grounds in the trial court. We find no forfeiture, because any such objection would have been futile. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793.)

At the hearing on the motions, the trial court remarked that rumors generally did not have a place in a trial because they were not admissible evidence. Defense counsel argued the rumors of N. sleeping with defendant were relevant to N.'s credibility concerning her receipt of a text message from defendant in which defendant supposedly said he was going to kill Fisher. Counsel represented that it was the defense's theory the text messages were deleted because N. was trying to hide her communications and relationship with defendant from Sherry. Counsel asserted this supported rumors that Sherry suspected N. was sleeping with defendant, and "dovetail[ed]" into the rumors N. wanted to "kick it" with Fisher. The court suggested defense counsel could confront N. regarding the text messages and the theory that the fact of multiple text messages suggested a relationship, but questioned the value of rumors Sherry may have heard. It did, however, agree to hold a section 402/403 hearing on the matter.

With respect to rumors N. and Fisher wanted to "kick it," the court determined this was based on information Fisher's sister gave to the district attorney's investigator, that Sherry told the sister that K. told Sherry that Fisher told K. that he wanted to "kick it" with N. The sister further stated that Fisher told her that N. wanted to "kick it" with him, but he did not want to "kick it" with her. The sister interpreted "kick it" as meaning to have a relationship. The court excluded the evidence, ruling that multiple levels of hearsay were not admissible, even in the context in which defense counsel argued them, as they were confusing and not reliable.

At the section 402/403 hearing, Sherry testified there was talk among family members that N. may have had some type of sexual interest in defendant. Sherry had no direct knowledge whether any such rumors were true. She never personally saw anything to indicate N. and defendant had a sexual relationship.

Sherry further testified that a couple of weeks earlier, Ms. Hall, an investigator with the district attorney's office, was serving subpoenas on members of the family for defendant's trial. N. did not want to be served. Sherry was upset at N. for not being

cooperative and meeting with Hall. During the conversation when both women were upset at each other, N. said she was just going to come in the courtroom and let everybody know she was in a relationship with and had had sex with defendant. This was upsetting to Sherry, who brought it to Hall's attention.

According to Sherry, Hall and N. moved away from Sherry to talk. After, N. confronted Sherry about what Sherry told Hall. N. denied making such a statement, and explained that what she said was that if she took the witness stand, she would ask defendant if he had had sex with her and he would deny it. Both women were upset and their voices were raised. Sherry told N. that was not how she remembered the original conversation. At the hearing, however, Sherry admitted she had misunderstood what N. said originally. Sherry had no direct information of a relationship between N. and defendant, and was not aware of anything that would prove the existence of such a relationship.

Sherry had seen two or three text messages between N. and defendant. It would surprise her if it were shown the two exchanged multiple text messages throughout the day on July 3. Sherry had no knowledge whether N. would go to defendant's apartment while Sherry was not present, or if defendant would go to N.'s apartment without Sherry knowing. Sherry was aware defendant bought toiletries and house goods for N., and he once paid for a manicure and pedicure for both women. Sherry was not aware of any sexual text messages between N. and defendant.

At the conclusion of the hearing, the trial court granted the People's motion to preclude evidence regarding rumors N. slept with defendant, with the exception that defense counsel could confront N. about text messages sent the day before the shooting, and could suggest they may have been of a sexual or personal nature.

N.'s trial testimony concerning her exchange of text messages with defendant, and the absence of those texts from her cell phone, is summarized in the statement of facts, *ante*. She described some of the text messages exchanged on July 3 as having to do with

defendant's suspicions about Sherry and Fisher, while others shown in the cell phone records were exchanges between N. or her sister and Sherry, who sometimes used defendant's cell phone. Defense counsel questioned her at length about the number and content of the messages. N. denied deleting the messages herself. She denied having anything to hide. Messages she exchanged during that period of time with her boyfriend and another friend were also deleted.

N. denied being more than friends with defendant. Sherry testified, however, that she (Sherry) believed they were more than just friends.

2. Analysis

"The trial court has considerable discretion in determining the relevance of evidence. [Citations.] The 'existence or nonexistence of a bias, interest, or other motive' on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony . . . ." (*People v. Williams* (2008) 43 Cal.4th 584, 634; see § 780, subd. (f).) Thus, defense counsel in a criminal action should be given wide latitude in cross-examining prosecution witnesses and testing their credibility. (*People v. Murphy* (1963) 59 Cal.2d 818, 830-831; *People v. Adames* (1997) 54 Cal.App.4th 198, 208.) As the United States Supreme Court has stated: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska* (1974) 415 U.S. 308, 316-317.)

This does not mean no limits whatsoever may be placed on cross-examination, however. "The extent of cross-examination with respect to an appropriate subject of

inquiry is within the sound discretion of the trial court." (*Alford v. United States* (1931) 282 U.S. 687, 694.) Thus, the trial court may control such cross-examination, even with regard to motive and bias, pursuant to section 352. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 779-781, overruled on another ground in *People v. Cortez* (2016) 63 Cal.4th 101, 118 & disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Rodriguez* (1986) 42 Cal.3d 730, 749-750; *People v. Burgener* (1986) 41 Cal.3d 505, 525, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

The relationship of a witness to the defendant or others in a case is a proper subject for cross-examination designed to show bias. (E.g., *Olden v. Kentucky* (1988) 488 U.S. 227, 232; *People v. Carpenter* (1997) 15 Cal.4th 312, 408, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 & superseded by statute on another ground as stated in *Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1106; *People v. James* (1976) 56 Cal.App.3d 876, 886-887; *People v. Warren* (1959) 175 Cal.App.2d 233, 241.) In the present case, however, defendant sought admission of mere rumors N. was sexually involved with defendant. In our view, such evidence — if it may properly be called that — had no "tendency *in reason* to prove or disprove the truthfulness of" N.'s testimony (§ 780, subd. (f), italics added) or was, at the very least, so marginally relevant that the trial court did not abuse its discretion by excluding it. (See *People v. Mills* (2010) 48 Cal.4th 158, 194-196.)[19] The same is true if we assume the problem of numerous levels of hearsay with respect to the "kick it" allegation could have been avoided because impeachment of N.'s credibility would have constituted a proper nonhearsay purpose.

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19 It has been held that a witness who testifies as to the defendant's good character may have his or her credibility tested by questions asking whether he or she has heard of certain rumors, occurrences, or specific acts of misconduct. (*People v. Darby* (1952) 114 Cal.App.2d 412, 440-441.) The present case does not present that type of situation.

The trial court's rulings fell within its discretion. Significantly, it permitted defense counsel to examine N. and Sherry concerning N.'s relationship with defendant. Application of the ordinary rules of evidence to exclude rumors on the subject and multiple levels of hearsay concerning N.'s relationship with Fisher did not infringe on defendant's due process right to present a defense. (*People v. Frye* (1998) 18 Cal.4th 894, 948, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Nor did the rulings violate defendant's confrontation rights. " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citation.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] . . . Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" (*People v. Frye, supra,* 18 Cal.4th at p. 946; see *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Defendant has failed to make the requisite showing.

C. <u>Fisher's Statement about Visitation Problems</u>

Defendant contends the trial court abused its discretion by admitting a hearsay statement by Fisher about problems visiting his children. He further says that since the

statement was admitted, he should have been permitted to impeach Fisher's credibility by means of Fisher's prior convictions. We find no error in either regard.[20]

1. Background

The People moved, in limine, for admission of Fisher's statement to Cardell, following Fisher's telephone conversation with Sherry, that an argument had occurred and that Sherry and defendant were " 'going off' " on him. The People asserted the statement was admissible pursuant to section 1240, and was also admissible for the nonhearsay purpose of corroborating that an argument occurred approximately 15 minutes before the shooting, which in turn was relevant to why defendant was upset at Fisher and defendant's motive for the shooting. Defense counsel objected that the statement did not qualify as an excited utterance, and also argued that corroboration was neither a hearsay exception nor a nonhearsay purpose.

Outside the presence of the jury, Cardell testified that on the morning of July 4, Fisher asked to use Cardell's house phone to call his children. Fisher said his sister had invited him and the children over for a barbecue, so he wanted to "round them up" and take them.

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[20] In his reply brief, defendant concedes — after seeming to suggest otherwise in his opening brief, thereby necessitating the Attorney General brief the issue — that testimonial hearsay within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, is not at issue. We agree, and so do not discuss *Crawford*.

For the first time in his reply brief, defendant states the two asserted errors were cumulative of other errors at trial. He does so without any supporting argument or authority. As a general proposition, points raised for the first time in a reply brief will not be considered unless good reason is shown for failure to present them earlier. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.) Defendant has not attempted to show any reason here. Moreover, " '[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.' " (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282; see *People v. Hardy* (1992) 2 Cal.4th 86, 150.) We decline to discuss cumulative prejudice further.

Cardell was standing right next to Fisher during the entire phone call, although he could only hear Fisher's end of the conversation. Fisher was trying to talk to K., and "evidently there was some kind of commotion." Fisher could not get through to her. Fisher said, "I don't understand why they won't let me talk to my daughter." He also said somebody snatched the phone from K., and that he heard "some kind of commotion," with screaming and hollering being directed at him. He said Sherry had "a few words" for him. He also said he heard someone in the background "going off on" K.

Fisher said this after he got off the phone. While he was on the phone, he was fairly calm, although he was starting to get frustrated toward the end of the call. His voice went up, although not to the point that he was yelling. He still seemed very frustrated after the call ended. He said he was talking to K., and it seemed like somebody grabbed the phone and took it out of her hand. He said every time he tried to contact his children, there was always a problem. Fisher was "a lot frustrated" and angry. His voice went up when he was talking.

Cardell began talking with Fisher about what happened as soon as Fisher got off the phone. They talked about what happened for 10 or 15 minutes. Fisher seemed to calm down after a bit and his voice went back down. Cardell told Fisher that Fisher could visit the children at Cardell's home or at the nearby park, and that Fisher did not have to involve himself with what was happening at the apartments. They then started talking about the economy and other subjects.

At the conclusion of the hearing, defense counsel argued Fisher's statements did not qualify as spontaneous utterances, because the problem with seeing his children was an ongoing one that was a common occurrence. Counsel also argued that while Fisher's voice was elevated, there was no yelling or screaming, and Fisher was not physically agitated. Accordingly, the stress did not rise to the level required for the hearsay exception. Counsel further argued there was no hearsay exception for corroboration, and

that if corroboration constituted a nonhearsay purpose, the hearsay rule would cease to exist.

The court ruled:

> "The rationale of . . . Section 1240 is that the spontaneity of such statements and the consequence [*sic*] lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness. When you look at this rationale it seems like the People have satisfied the requirements under 1240. It is clear from [Cardell's] testimony that this conversation that Mr. Fisher was having caused his voice to rise. He described Mr. Fisher as angry and frustrated. And he told the Court that he had to change the subject because he wanted to calm Mr. Fisher down. The question of whether this event seeing your kids or trying to see your kids would qualify as . . . something that would cause high level of stress or excitement. . . . I'm of the view that it would. Family matters are often emotionally charged and they are exciting. And then having essentially a phone conversation where you are hoping to see a kid and then the door is essentially shut on you. That would certainly be an instance where I could see someone's stress level, anger and frustration rising to a point where they aren't really thinking about or deliberating on what they are telling or fabricating. They are just saying what happened. . . . I'm of a mind to allow under 1240 some statements made by Mr. Fisher to Cardell . . . . And the substance of it would be that, 'It's always a hassle trying to speak to my kids,' and, 'That there was a lot of yelling and screaming going on[']: That's it. I'm limiting it. Not that Sherry . . . went off on him or [defendant] 'cause it's not really clear."

During trial, defense counsel objected on hearsay grounds to Cardell's testimony concerning Fisher's telephone conversation. The objection was overruled.

Defense counsel subsequently moved to be allowed to impeach Fisher's credibility, pursuant to section 1202, with Fisher's prior felony convictions of moral turpitude, specifically his convictions for violating Health and Safety Code section 11351 and Penal Code section 245, subdivision (a)(1). The prosecutor argued that the spontaneity of a statement admitted under section 1240 and consequent lack of opportunity for reflection and deliberate fabrication provided an adequate guarantee of trustworthiness; hence, the prior convictions should be excluded pursuant to section 352

because impeachment had very little value, the prior convictions were remote in time, and the jury was already going to hear of Fisher's domestic violence. Defense counsel responded that Fisher's statements were being admitted for their truth, and that if Fisher himself was testifying, counsel would have the right to impeach his credibility with his convictions for crimes of moral turpitude. Counsel further argued that although the conviction for drug sales was old, Fisher had a continuous record of violating the law.

The court reiterated the rationale underlying section 1240, and noted it appeared Sherry was going to acknowledge there were visitation issues. The court found section 1202 did not preclude a section 352 analysis, which the court had undertaken. It concluded the probative value of the defense's proffered evidence was substantially outweighed by the undue consumption of time and the significant likelihood of undue prejudice and confusion of issues. The court found Fisher's conviction for possession of drugs for sale was 25 years old, "obviously remote and somewhat lacking in probative value." As for the assault conviction, the court observed it had already ruled defendant could elicit, through Sherry's testimony, that she told defendant of acts of violence perpetrated by Fisher. The court concluded that introduction of other violent acts resulted in the same section 352 inquiry and the same result.

2. Analysis

a. Admission of Fisher's statement

There can be no doubt that Fisher's statement, which was offered for the truth of the matters contained therein, constituted hearsay. (§ 1200, subd. (a).)[21] "Except as provided by law, hearsay evidence is inadmissible." (§ 1200, subd. (b).) Pursuant to section 1240, "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event

[21] In light of our conclusion the statement was properly admitted pursuant to section 1240, we need not discuss the prosecutor's claim it was also admissible for a nonhearsay purpose.

perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The "crucial element" is "not the nature of the statement but the mental state of the speaker." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on another ground in *People v. Waidla*, *supra*, 22 Cal.4th at p. 724, fn. 6.)

" 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) For purposes of this exception to the hearsay rule, " '[s]pontaneous' does not mean that the statement be made at the time of the incident, but rather in circumstances such that the statement is made without reflection. [Citations.]" (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1388.)

"Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.] In performing this task, the court 'necessarily [exercises] some element of discretion . . . .' [Citation.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 318.) The preliminary facts that bring statements within the exception require only proof by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966.)

A trial court's decision to admit evidence under section 1240 will not be reversed unless the court abused its discretion (*People v. Roldan* (2005) 35 Cal.4th 646, 714, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22), which is " 'at its broadest' when [the court] determines whether an utterance was made

while the declarant was still in a state of nervous excitement. [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 496.) "A number of factors may inform the court's inquiry . . . . Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant's emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. [Citations.] [The California Supreme Court] has observed, however, that these factors 'may be important, but solely as an indicator of the mental state of the declarant.' [Citation.] For this reason, no one factor or combination of factors is dispositive. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 64-65.)

In our view, the foundational facts were sufficiently established. Fisher's demeanor and voice were not calm and modulated; rather, his voice was elevated, and he was frustrated and angry. (Cf. *People v. Lucas* (2014) 60 Cal.4th 153, 270, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53-54, fn. 19.) The statement was made immediately after the precipitating occurrence, and it took some time and a change of subjects for Fisher to become calm again. All the circumstances being considered, the trial court's decision to admit the evidence was reasonable and so did not constitute an abuse of discretion. (See *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Defendant disagrees. He says Fisher's statement "was far from instinctive and uninhibited" but rather "was a rumination on past injustices," and was "an expression of opinion, meant more to engender sympathy than to accurately record events." He says that had Fisher testified, he would not have been able to opine that every time he tried to visit his children, he was prevented by defendant's "malicious and controlling obstruction." Fisher's statement contained no such opinion, however. Moreover, that the trial court might have reached such conclusions on the evidence before it does not mean it was required to do so.

b. Exclusion of impeachment evidence

Section 1202 provides, in pertinent part: "Any . . . evidence offered to attack or support the credibility of the [hearsay] declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." The California Supreme Court has assumed, and Courts of Appeal have held, the use of prior felony convictions as impeachment evidence falls within the purview of this provision, and that admission of such convictions pursuant to section 1202 is subject to the trial court's discretion under section 352. (*People v. Brooks* (2017) 3 Cal.5th 1, 51-52; *People v. Little* (2012) 206 Cal.App.4th 1364, 1373-1377; *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1449-1452.)

> "A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under . . . section 352.[22] [Citations.]
>
> " '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude . . . section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.] When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, [and] whether it is near or remote in time . . . .
>
> "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931-932, fn. omitted.)

Because Fisher did not lead a blameless life following the 1991 and 2007 convictions at issue, the trial court reasonably could have permitted those convictions to

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22 We assume Fisher's proffered prior convictions were for crimes involving moral turpitude. (See *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381 [assault with a deadly weapon]; *People v. Vera* (1999) 69 Cal.App.4th 1100, 1103 [possession of drugs for sale].)

be used for impeachment, despite their remoteness in time and the fact evidence of Fisher's domestic violence was already being admitted. (See, e.g., *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926; *People v. Green* (1995) 34 Cal.App.4th 165, 183.) This does not mean the court acted unreasonably and so abused its discretion in not doing so, however. " 'When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge.' [Citation.]" (*People v. Goldman* (2014) 225 Cal.App.4th 950, 959.)

Fisher's statement was admitted pursuant to section 1240. "The rationale of [the exception to the hearsay rule codified in this statute] is that the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1240, p. 370; see *People v. Merriman*, *supra*, 60 Cal.4th at p. 64; *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522.) Thus, the probative value of the prior convictions was minimal under the circumstances.

Defendant fails to convince us that, in light of the admission of that domestic violence evidence and evidence Fisher had recently been released from prison, the exclusion of the proffered prior convictions gave Fisher a false aura of veracity. (Compare *People v. Richardson* (2008) 43 Cal.4th 959, 1009 & *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554 with *People v. Green*, *supra*, 34 Cal.App.4th at p. 183 & *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647.) There was no abuse of discretion.[23]

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[23] Were we to find error in admission of the statement, exclusion of the prior convictions, or both, we would conclude such error was harmless. In light of the other evidence concerning the telephone conversation and Fisher's criminal background, there

II

SENTENCING ISSUES

A. Senate Bill No. 620

The probation officer's report showed defendant's criminal history dated back to 1993. The report listed four factors in aggravation and none in mitigation. It recommended imposition of a sentence of 15 years to life in prison for second degree murder, plus a mandatory consecutive term of 25 years to life for the firearm enhancement under Penal Code section 12022.53, subdivision (d), for a total term of 40 years to life in prison.

At sentencing, the court stated:

> "Let me first say it regretfully, that I view this case in its simplest terms was [*sic*] a senseless act of violence which I've seen all too often during my career. The victim, Raymond Fisher, although not perfect, was making efforts to be a productive citizen and to be an engaged father. Sadly, those efforts came to an abrupt and violent end. Rather than spending the 4th of July with his children celebrating the birth of our great nation, Mr. Fisher was gunned down by the Defendant. Whether that occurred as a result of jealousy, animosity, or frustration, the result is the same. Responsibility for Raymond Fisher's death falls upon the Defendant, Mr. Sams. Responsibility for judgment rests with me.
>
> "As [the prosecutor] noted, the law is clear. And I do find based upon the facts of this case and the Defendant's prior criminal history that the recommendation of Probation is appropriate. Therefore, accordingly probation is denied. The Defendant's committed to the California Department of Corrections and Rehabilitation for the indeterminate term of 15 years to life. Further enhanced by an additional consecutive indeterminant [*sic*] term of 25 years to life, which is pursuant to 12022.53(d) of the Penal Code."

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is no reasonable probability the jury would have reached a different result had Fisher's statement been excluded or his prior convictions admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Brooks*, *supra*, 3 Cal.5th at p. 52; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1308; see also *People v. Whitson* (1998) 17 Cal.4th 229, 251.)

At the time defendant was charged, convicted, and sentenced, subdivision (h) of Penal Code section 12022.53 provided: "Notwithstanding [Penal Code] Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Thus, the trial court had no choice but to enhance defendant's sentence by 25 years to life.

After defendant was sentenced, but while his appeal was pending, the Legislature enacted Senate Bill No. 620. (Stats. 2017, ch. 682, § 2.) As of January 1, 2018, subdivision (h) of Penal Code section 12022.53 provides: "The court may, in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Defendant's case was not yet final when the foregoing amendment went into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) In light of this fact and the fact Penal Code section 12022.53, subdivision (h) now vests the trial court with authority to lower defendant's sentence, we conclude the amendment applies to the instant case. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; see *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

The Attorney General concedes the amendment applies to defendant, but argues a remand is not appropriate because there is no reason to believe the trial court would exercise its discretion to strike the firearm enhancement. The Attorney General points to the multiple circumstances in aggravation, the absence of any mitigating circumstances, the circumstances of the offense, and the court's statements at sentencing. We acknowledge these factors, but conclude that, given the mandatory length of the sentence, the record does not clearly indicate the trial court would not have exercised its discretion to strike the firearm enhancement had it known it had such discretion. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) While we may doubt the trial court will strike

the enhancement (and express no opinion concerning the appropriate exercise of its discretion), the trial court lacked any discretion whatsoever in fashioning defendant's sentence. Neither the sentence imposed nor the court's comments furnish the clear indication required by the California Supreme Court. (*Ibid*.)

B. Restitution Order

The probation officer recommended defendant be ordered to pay restitution to the California Victim Compensation Board (Board) in the amounts of $5,000 (Fisher's sister; funeral benefits), $2,000 (Sherry; relocation benefits), and $1,764 (N.; relocation benefits), for a total of $8,764. At sentencing, defendant objected to the amounts attributed to relocation costs. The court stated it was not satisfied those items were appropriate. In imposing sentence, it ordered defendant to pay $5,000 to the Board. Despite this fact, the minutes of the November 22, 2016 sentencing hearing and the abstract of judgment both reflect the court ordered victim restitution in the total amount of $8,764. The Attorney General concedes both must be corrected to conform to the trial court's oral pronouncement of judgment.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to exercise its discretion under section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018), and, if appropriate following exercise of that discretion, to resentence defendant accordingly.

The trial court shall cause the minutes of the November 22, 2016 sentencing hearing to be corrected to reflect victim restitution was ordered, pursuant to section 1202.4, subdivision (f), in the amount of $5,000 to the California Victim Compensation Board. The trial court shall further cause to be prepared an amended abstract of judgment that reflects an award of victim restitution in the amount of $5,000 and, if applicable, resentencing; and shall cause a certified copy of same to be transmitted to the appropriate authorities.

_____
DETJEN, J.

WE CONCUR:

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HILL, P.J.

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LEVY, J.